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Non-proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council CURRENT LEGAL DEVELOPMENTS

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CURRENT LEGAL DEVELOPMENTS

Non-proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council

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Abstract
This article argues that in passing Resolution 1540, the UN Security Council has confused the proper scope of its enforcement powers under Chapter VII with the proper scope of its long unused, limited, lawmaking powers under Article 26. It has thereby taken to itself by unilateral exercise of its Chapter VII powers a role which, under the Charter system, it is to share with both the General Assembly, in the exercise of its Article 11(1) powers, and the general membership of the United Nations, to whom it is directed under Article 26 to submit proposals for the creation of new international laws in the area of weapons proliferation.

Key words
legislation; non-proliferation; Security Council; United Nations

This article will discuss the role of the United Nations in creating, facilitating, maintaining, and implementing international law on the subject of the proliferation of weapons of mass destruction (WMD). As the cornerstone international organization in the area of international peace and security, the United Nations has had a long history of engagement with the issue of WMD proliferation, beginning with the very first General Assembly Resolution on 24 January 1946. Indeed, the UN Charter itself gives to the political bodies of the organization specific powers to participate in the creation of new international law on issues of WMD proliferation, as well as special powers of enforcement of non-proliferation law to the UN Security Council.

During the Cold War the UN political bodies struggled to find a meaningful role to play in the area of WMD proliferation as the two superpowers engaged in seemingly unbridled expansion of their nuclear arsenals. Despite some influence, particularly by the General Assembly, on the negotiation of multilateral treaties such as the 1968 Nuclear Non-proliferation Treaty, carried on outside the UN framework, efforts by the political bodies during this period to use their non-proliferation powers under the Charter met with little success.[1]

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1. J. Goldblat, *Arms Control* (2002), at 34–7.

After the ending of the superpower arms race in 1991, the Security Council, which had been most affected in its ability to function effectively due to the antipathetic state of relations between two of its veto-wielding permanent members, enjoyed a renewal of its ability to find common cause among its member states in an array of international security issue areas, and a new-found effectiveness in Council decision-making.[2] This renewal of activity produced resolutions under the Council's Chapter VII authority to maintain and restore international peace and security with regard to situations in, among other places, the Balkans, Haiti, Somalia, Rwanda, the Democratic Republic of the Congo, Afghanistan, and Libya. In the WMD non-proliferation issue area, this renewed ability of the Security Council to use its Chapter VII powers was illustrated in 1991, in the passage of Resolution 687, which imposed specific weapons-related prohibitions on Iraq, and established an inspection and verification regime in order compulsorily to disarm Iraq of its WMD and related technologies possessions.[3]

However, the passage by the Security Council of Resolution 1540 in 2004 marked the beginning of a new chapter of its action in the area of WMD proliferation, and manifested a continuation of a distinct change in the Council's understanding of its role and powers under Chapter VII.[4] Through Resolution 1540, the Security Council used its binding authority under Article 25 of the Charter to impose on all UN member states obligations to enact and enforce a range of non-proliferation-related regulations of universal scope and unlimited duration in their national legal systems, and to co-operate in international non-proliferation efforts.

To many, the passage of Resolution 1540 was a long-awaited direct engagement by the Security Council in the area of WMD proliferation, and a welcome addition to the corpus of international legal obligations pertaining in this issue area. However, this article will argue that, whatever its practical utilities, from an international jurisprudential standpoint Resolution 1540 is a legal travesty, and a dangerous departure from understandings of the authority of the Security Council pursuant to which the Council itself operated during the first 56 years of its existence.

The article will first review the powers of law creation and law enforcement granted to the political bodies of the United Nations under the Charter in the area of non-proliferation law, and will discuss their use (or more commonly disuse) since the Charter's founding. Consideration will then turn to the Security Council's passage of Resolution 1540 and to its meaning and import to the existing non-proliferation treaties and regimes system, as well as to a review of the harmony of the passage of this resolution with the limited powers of the Security Council under the Charter. It will conclude that in passing Resolution 1540, the Security Council acted *ultra vires* its authority under the Charter, and will argue that this action marks an alarming continuation of a trend in Security Council legislation first apparent in the passage of Resolution 1373 in 2001.[5]

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2. D. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004).
3. UN Doc. S/Res/678 (1990).
4. UN Doc. S/Res/1540 (2004).
5. UN Doc. S/Res/1373 (2001); M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', (2003) 16 LJIL 593.

1. The UN Charter and WMD non-proliferation law

The UN Charter makes no mention of the term 'proliferation' and makes no distinction in the language of its provisions as between conventional and non-conventional weapons. Making such a distinction based on particular weapons technologies only evolved as a custom after the advent of the nuclear weapons age in August 1945, only two months after the signing of the UN Charter, although chemical and biological weapons had existed in various forms and been used in warfare for centuries, and had been addressed specifically in the 1925 Geneva Protocol.

The Charter rather uses the terms 'disarmament' and the 'regulation of armaments' in three of its articles – Article 11(1), Article 26, and Article 47. These terms are used to address the subject of the regulation of military armaments generally through international law, since such technologies existed and were maintained in national arsenals at the time of the drafting of the Charter.[6] As will be discussed below, the UN Charter system was constructed to address issues of international arms control and to generate international law to regulate this issue area. In terms of coverage, arms control law is a broader jurisprudential framework than is non-proliferation law, importantly conceptually including the legal regulation of development, possession, and proliferation of WMD, which comprises non-proliferation law, but also including the legal regulation of conventional weapons technologies.[7]

Thus, as the history of General Assembly and Security Council resolutions which will be reviewed below makes clear, the UN Charter system should be understood to have application to the creation, facilitation, maintenance, and implementation of WMD non-proliferation law, as a subset of issues within its general competence with regard to arms control law.

2. Review of Charter provisions

Overall the subject of the regulation of military armaments receives significantly less attention, and less clarity, in the UN Charter than it did in the League of Nations Covenant, which in Article 8 declares as a principle of international law that 'the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations'.[8] Article 8 proceeds to spell out the role of the League Council in helping states to establish minimum thresholds for state maintenance of military armaments, and forbids the possession of armaments in excess of those limits without the consent of the Council. It further requires member states to engage in a 'full and frank' exchange of information regarding the scale of their armaments.

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6. D. Cheever, 'The UN and Disarmament', (1965) 19 *International Organization* 453.
7. H. Schutz, 'Arms Control', *Encyclopaedia of Public International Law* (1992–2000), I, 259–67; H. Bull, *The Control of the Arms Race: Disarmament and Arms Control in the Missile Age* (1965); D. Joyner, *Non-proliferation Law: The Regulation of WMD* (forthcoming 2008); Goldblat, supra note 1.
8. B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2002), 465.

The difference in the context of the signing of the two documents largely explains the lesser emphasis placed by the Charter on the idea of disarmament as an absolute principle. In the year leading from the Dumbarton Oaks Conference in August 1944 to the final signing of the UN Charter in San Francisco in June 1945, the Charter framers were still at war, and thus had little interest in prescribing a new international legal system for universal disarmament.[9] Even in their thoughts regarding postwar plans, they abandoned the idea so central to the League of Nations Covenant that universal disarmament was necessary for the maintenance of peace. On the contrary, it was recognized that maintenance of military armaments would be necessary to effect the collective security system envisioned under the new Charter framework, which relied on the provision of forces by national governments to maintain international peace and security, under the direction of the Security Council.[10]

There was an acknowledgement that a general limitation of armaments could be a useful strategy to avoid excessive stockpiling of weapons and the reciprocal arms races that such production could engender, with negative effects on national resource utilization and international security generally. However, the UN Charter moved away from a reliance on disarmament as a means to ensure international peace and towards a broader concept of arms control within a collective security system, of which the maintenance of national armaments, particularly by major powers, was a necessary part.[11]

Thus the Charter sought to strike a much more neutral position regarding the powers and responsibilities of its organs with regard to national armaments than had the League of Nations Covenant, by substituting, or at least supplementing, references to disarmament with the more generalized term 'regulation of armaments'.[12] In Article 11(1), therefore, the Charter states that

> The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

Article 11(1) is a further specification, and not a limitation, of the general powers of consideration and recommendation granted to the General Assembly in Article 10.[13] The General Assembly under Article 11(1) is to consider 'general principles of cooperation in the maintenance of international peace and security', a power which should be read to include consideration of abstract, general ideas about how member states should work together, and fundamental principles which should underpin the legal relationships which bind states in this area.[14] This power is apposite to the General Assembly due to its character as the essential

9. Cheever, *supra* note 6, at 453; Simma et al., *supra* note 8, at 465–6.
10. Ibid.
11. Ibid.
12. J. Barton, 'Disarmament', *Encyclopaedia of Public International Law* (1992–2000), I, 1072–6.
13. Simma et al., *supra* note 8, at 277–8.
14. Ibid., at 277–80.

deliberative organ of the United Nations, and the only UN body comprising all members of the organization, thus allowing the broadest possible spectrum of interests and perspectives to have input into the formulation of these basic principles governing state co-operation in international arms control efforts.[15]

Notwithstanding the relatively low emphasis placed on arms control in the Charter generally, the General Assembly's first ever resolution, passed at its Seventeenth plenary meeting on 24 January 1946, was in exercise of its powers under Article 11(1). In Resolution 1, entitled 'Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy', the General Assembly created the Atomic Energy Commission (AEC), which was to be composed of a representative of each state on the Security Council and Canada. The AEC was given a mandate to 'proceed with utmost despatch and inquire into all phases of the problem' of the discovery of atomic energy, and to make specific proposals:

(a) 'for extending between all nations the exchange of basic scientific information for peaceful ends';

(b) 'for control of atomic energy to the extent necessary to ensure its use only for peaceful purposes';

(c) 'for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction'; and

(d) 'for effective safeguards by way of inspection and other means to protect complying States against the hazards of violation and evasions'.[16]

The reason for the inclusion of this action in the very first General Assembly resolution was of course the fact that the world had only months earlier found out about the development by the United States of nuclear fission weapons and their use on the cities of Hiroshima and Nagasaki, Japan, in August 1945. In this resolution the General Assembly extended as a matter of course its authority to consider issues of arms control and to include consideration of issues regarding nuclear weapons and 'all other weapons adaptable to mass destruction', thereby clarifying the application of the Charter's terms to both conventional and WMD technologies, since that distinction began to be made from this time.

The early history of the AEC, perhaps not surprisingly, was to be a controversial one. The US representative at the AEC, Bernard Baruch, presented a plan to the Security Council in June 1946 which included a proposal to establish a treaty-based organization, to be called the International Atomic Development Authority (IADA), the task of which was to own, operate, manage, and license all atomic energy research and production facilities on behalf of the nations of the world. It was in essence a proposal to disarm all states of atomic weapons and create an international

15. L. Sohn, 'Enhancing the Role of the General Assembly of the United Nations in Crystallizing International Law', in J. Makararczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (1975), 549–61; O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966); J. Castaneda, *Legal Effects of United Nations Resolutions* (1969).

16. Para. 5.

organization to control and administer nuclear technologies, including the authority to conduct an inspection regime continuously in all countries to maintain its monopoly on nuclear resources. The United States, as the sole possessor of the secrets of the full nuclear fuel cycle, would not be subject to the authority of the IADA until its control regime had been fully established, holding the atomic knowledge in 'sacred trust' for all humankind, and of course maintaining a strategic advantage over the Soviet Union.[17]

The Soviet Union, for its part, forwarded a counterproposal which would entail the creation of two new treaty regimes, one immediately and universally to outlaw nuclear weapons, and the other to organize the controls of the AEC and guarantee procedures for sharing nuclear information and technologies between states for peaceful purposes. These proposals, of course, would have neutralized the United States' nuclear advantage, but would also have left disarmament efforts largely in the hands of national governments, with an international organization having only limited rights to conduct 'periodic' inspections of nuclear facilities.[18]

The result of these conflicting proposals was a compromise reached in the General Assembly by the passage on 14 December 1946 of Resolution 41, which used the recommendation power of the General Assembly under Article 11(1) for the first time. Resolution 41 is divided into nine paragraphs, in which the General Assembly makes two statements of recognition of 'general principles of cooperation in the maintenance of international peace and security' and six 'recommendations with regard to such principles' to the Security Council. The two statements of recognition are

1. 'the necessity of an early general regulation and reduction of armaments and armed forces';[19] and
2. 'that essential to the general regulation and reduction of armaments and armed forces, is the provision of practical and effective safeguards by way of inspection and other means to protect complying states against the hazards of violations and evasions'.[20]

Based on these statements of general principle, the General Assembly recommends in Resolution 41, *inter alia*, that

> the Security Council expedite consideration of the reports which the Atomic Energy Commission will make to the Security Council and that it facilitate the work of the Commission, and also that the Security Council expedite consideration of a draft convention or conventions for the creation of an international system of control and inspection, these conventions to include the prohibition of atomic and all other major weapons adaptable now and in the future to mass destruction and the control of atomic energy to the extent necessary to ensure its use only for peaceful purposes.[21]

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17. Cheever, *supra* note 6, at 468–70; B. Bechhoefer, *Postwar Negotiations for Arms Control* (1961).
18. Ibid.
19. Para. 1.
20. Para. 5.
21. Para. 4.

And, further, that

> the Security Council give prompt consideration to formulating the practical measures, according to their priority, which are essential to provide for the general regulation and reduction of armaments and armed forces and to assure that such regulation and reduction of armaments and armed forces will be generally observed by all participants and not unilaterally by only some of the participants. The plans formulated by the Security Council shall be submitted by the Secretary-General to the Members of the United Nations for consideration at a special session of the General Assembly. The treaties or conventions approved by the General Assembly shall be submitted to the signatory States for ratification in accordance with Article 26 of the Charter.[22]

The Security Council on 13 February 1947 responded to General Assembly Resolution 41 with Security Council Resolution 18, in which it resolved:

1. To work out the practical measures for giving effect to General Assembly resolution 41 . . .;
2. To consider as soon as possible the report submitted by the Atomic Energy Commission and to take suitable actions to facilitate its work;
3. To set up a commission consisting of representatives of the members of the Security Council with instructions to prepare and submit to the Security Council . . . the proposals (*a*) for the general regulation and reduction of armaments and armed forces, and (*b*) for practical and effective safeguards in connection with the general regulation and reduction of armaments, which the commission may be in a position to formulate in order to ensure the implementation of the above-mentioned resolution of the General Assembly . . .;[23]

The Security Council's relative quickness to accept the General Assembly's recommendations in Resolution 41, and willingness to implement them, is explainable by reference to the Security Council's duty in this area as specified in Article 26 of the Charter, cited by the General Assembly in Resolution 41. Article 26 provides:

> In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

A number of points regarding the Security Council's role under Article 26 bear mention. First is to observe that Article 26, in addition to conferring powers and function on the Security Council, also establishes obligations for the Council in carrying out its complementary role with the General Assembly in the exercise of its Article 11(1) powers. The Council is given the responsibility, on the basis of the recommendations of 'general principles of cooperation' it receives from the General Assembly, and with the assistance of the Military Staff Committee, to formulate

22. Para. 2.
23. Paras. 1–3.

concrete plans in order to implement the general principles recommended by the Assembly. These plans are to compose a coherent 'system' for the regulation of armaments, which would imply that the plans to be authored by the Council using this power are not to be situation-specific, as in the case of an ad hoc response to a discrete event in international affairs. Rather, these plans are to form the basis for a universally applicable, enduring system of 'practical and effective' international arms control.[24]

The Security Council's responsibility to make concrete plans based on General Assembly recommendations of general principle is apposite to the former body, particularly as the membership of the Council was designed to consist of the great military powers. The conferral by the Charter of this power and responsibility upon the Council is a recognition of the likelihood that these states will have the largest military arsenals and thus that their support will be required for any international plan for the regulation of armaments to be implementable.[25] It is also apposite because of the size of the Security Council, and the recognition that consensus on specific plans is more likely to be obtainable among a group the size of the Security Council than a group the size of the General Assembly. Thus, while Article 11(1) is in keeping with a principled notion of universal participation by the international community of states in the construction of fundamental principles which should order relations among states in the area of international arms control, Article 26 is a recognition of the practical exigencies of international politics which demand that the Security Council, despite its unrepresentative character, have a vital role in the construction of plans for an international arms control system.

However, Article 26 is not in fact as violative of principles of sovereign equality as it first appears. It must be noted that the Security Council under Article 26 only has the power to formulate plans. It must then submit those plans to the member states of the United Nations for their approval and for establishment through multilateral treaty as actual legal principles governing their relationships with each other. The Security Council's plans in and of themselves have no binding force on members, and are merely hortatory offerings, although endowed with the gravitas of having been generated through the Charter system for creation of arms control law.[26] Members may, however, choose either to accept or reject these plans, in analogous fashion to the ratification of UN-approved treaties by member states. Thus under the Charter system member states retain their full sovereignty over decisions to enter into legal relationships in the area of international arms control. This right is not subsumed under the Council's decision-making powers under Article 25 nor under its broad powers to maintain international peace and security under the articles of Chapter VII.[27]

Notwithstanding this inability finally to bring about new law in the area of international arms control under their own authority, the political organs of the United

24. Simma et al., *supra* note 8, at 466–8.
25. Cheever, *supra* note 6, at 464–6.
26. Simma et al., *supra* note 8, at 466–8.
27. H. Kelsen, *The Law of the United Nations* (1951).

Nations are given an important role to play under the Charter system in facilitating co-operation and co-ordination between member states in reaching concrete agreements on the regulation of armaments.[28] This system is illustrated in the passage of General Assembly Resolution 41 and Security Council Resolution 18.

However, the subsequent history of the efforts commissioned by Resolution 18 was to comprise a cautionary tale for the practical implementation of this system. The studies and recommendations called for by the Security Council in Resolution 18 did not in the end result in plans being submitted to member states, since the commission created by the resolution was divided on fundamental issues.[29] This inability of the political organs of the United Nations, and particularly the Security Council, to act due to political deadlock between the superpowers on issues of arms control was to become an often repeated outcome, and formed the cause of the failure of the United Nations to make any meaningful progress in developing multilateral arms control law through the succeeding decades of Cold War tensions.

This article will proceed to consider in greater detail the role and record of each of the political organs in fulfilling their Charter mandates in the area of arms control and non-proliferation law.[30] It will conclude that both the General Assembly and the Security Council have largely failed to fulfil the roles and mandates given to them under the Charter in the area of non-proliferation law creation. It will then give particular consideration to the Security Council's recent use of its Chapter VII enforcement powers, instead of its Article 26 powers, to make non-proliferation law in the form of Security Council Resolution 1540.

3. The General Assembly

Consideration will first turn to a review of the efforts of the General Assembly and its subsidiary bodies in the area of non-proliferation law creation and maintenance, as well as that of the closely associated Conference on Disarmament.

3.1. The United Nations Disarmament Commission

In 1952 the Atomic Energy Commission and its sister agency, the UN Commission for Conventional Armaments, were in effect consolidated into a new single entity which was to take the lead role as the forum for consideration of arms control issues. This first incarnation of the UN Disarmament Commission (UNDC), like the AEC, included in its membership all the members of the Security Council plus Canada, and was instructed to prepare a draft treaty on the regulation and reduction of all armed forces and armaments and the elimination of all weapons of mass destruction. However, the new consolidated Commission suffered from disunity

28. F. Morley, *The Charter of the United Nations* (1946).
29. Cheever, *supra* note 6, at 470.
30. In Arts. 26 and 47 the Military Staff Committee is given an advisory role to the Security Council on an array of issues, including the regulation of armaments. The Military Staff Committee was mentioned in Resolution 18, and asked to submit a report to the Security Council on 'the basic principles which should govern the organization of the United Nations armed force'. The Committee did submit this report, and this remains its only significant accomplishment. It never exercised its advisory role under Art. 26 in the area of armaments regulation. Simma et al., *supra* note 8, at 770–5.

among its members on fundamental issues, and was unable to make significant progress on a treaty text. Eventually the work of the Commission ground to a halt and it met only infrequently after 1959.[31]

The UNDC was revived in 1978, during the General Assembly's First Special Session on Disarmament, and was reorganized as an inter-sessional, subsidiary organ of the General Assembly, composed of all member states of the United Nations. Its mandate was given in General Assembly Resolution S-10/2 as follows:

> The Disarmament Commission shall be a deliberative body, a subsidiary organ of the General Assembly, the function of which shall be to consider and make recommendations on various problems in the field of disarmament and to follow up the relevant decisions and recommendations of the special session devoted to disarmament. The Disarmament Commission should, *inter alia*, consider the elements of a comprehensive programme for disarmament to be submitted as recommendations to the General Assembly and, through it, to the negotiating body, the Committee on Disarmament.[32]

The UNDC currently meets for three weeks every spring, and operates in working groups and in plenary sessions, the number of working groups being determined by the number of substantive issues on its agenda. It submits a report annually to the General Assembly. Since 1989 its agenda has been limited to no more than four substantive items, with only two being considered as a matter of practice in recent years, each usually considered for three consecutive years.[33] For the past several years, discussion at UNDC annual meetings has focused on two agenda items:

1. recommendations for achieving the objective of nuclear disarmament and non-proliferation of nuclear weapons; and
2. practical confidence-building measures in the field of conventional weapons.

However, it has produced few recommendations, and has in fact experienced considerable difficulty even agreeing on its annual agenda.

3.2. Regular General Assembly sessions

Debate in the UNDC tends to mirror that held in the First Committee of the General Assembly, which is one of the main committees of regular General Assembly sessions and which since 1978 has dealt exclusively with arms control and other international security issues. Regular sessions of the General Assembly have produced numerous resolutions over the years on issues of arms control. A number of these have invoked or facilitated negotiations of important multilateral treaties addressing specific subjects of arms control.[34] One of the first, and perhaps the most important, of these was the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which was called for by the General Assembly as early as 1961.[35] In 1968, after the two superpowers had agreed on the terms in principle, the Assembly passed the final text of the treaty in

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31. Simma et al., *supra* note 8, at 473–5.
32. UN Doc. A/Res/S-10/2 (1978).
33. Goldblat, *supra* note 1, at 34–7.
34. Ibid.
35. UN Doc. A/Res/1665 (1961).

Resolution 2373.[36] Other important non-proliferation treaties endorsed or adopted by General Assembly resolution prior to coming into force include the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space; the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, the 1972 Biological Weapons Convention, the 1997 Chemical Weapons Convention, the 1996 Comprehensive Nuclear Test Ban Treaty, and, most recently, the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

However, the vast majority of the resolutions of the Assembly on arms control topics have had little effect either on multilateral negotiations on legally binding instruments or on the development of customary international law. General Assembly resolutions on arms-control and non-proliferation issues, and particularly on nuclear issues, are prolific in number. There are often several resolutions passed annually, sometimes with divergent recommendations to resolutions passed in previous years. This track record of resolutions, many of which are passed with significant opposing minorities of states, has diluted the significance and influence of General Assembly resolutions on the development of international law in this area. They have come to be seen by many not as a reflection of the broad-based consensus of states on 'general principles of cooperation in the maintenance of international peace and security', but as instruments of 'partisan' diplomacy through which groups of states take turns making political points against each other to forward their own political agendas.[37]

3.3. Special sessions

In addition to its work at regular sessions, the General Assembly has held three special sessions devoted to disarmament and arms control.

The first special session was held in 1978, and was instrumental in improving the transparency of arms control negotiations and in making the UN agencies involved in arms control more representative, particularly of non-nuclear states. The rejuvenation by the special session of the UNDC, and its restructuring from a closed group comprised of Security Council members plus Canada to a body on which all United Nations members are represented, is exemplary of this effort. The special session further broadened participation in arms control debate by allowing non-governmental organizations and research institutions to address the General Assembly directly for the first time. The session set out a number of disarmament principles and established the broad frameworks of a work programme for negotiators.[38]

The second special session, held in 1982, largely failed, however, to meet expectations. It was unable to agree on further aspects of a work programme, and spent considerable time and effort revisiting the issues on which it had agreed four years earlier. The only positive result of the session was consensus on a World Disarmament Campaign, which was to be a partnership between states, non-governmental

36. UN Doc. A/Res/2373 (1968).
37. Simma et al., *supra* note 8, at 280; Goldblat, *supra* note 1, at 34–7; Sohn, *supra* note 15.
38. Goldblat, *supra* note 1, at 34–7.

organizations and the United Nations, with the purpose of educating the public and fostering greater public understanding of and support for disarmament. In 1992 the World Disarmament Campaign was renamed the UN Disarmament Information Programme.[39]

The third special session, held in 1988, was an even greater disappointment, with virtually no progress being made on multilateral arms-control negotiations. Regional disputes formed one of the most substantial hindrances to negotiations, and blocked agreement on a final document.[40]

3.4. The Conference on Disarmament

In addition to re-establishing the UNDC, the Final Document of the first special session on disarmament in 1978 also sanctioned the work of another body comprising an important part of the organizational machinery of international arms-control debate and negotiations.[41] The Conference on Disarmament (CD), based in Geneva, is the successor organization to the Ten-Nations Committee on Disarmament (1959–60), the Eighteen-Nations Committee on Disarmament (1962–9), the Conference of the Committee on Disarmament (1969–78), and the Committee on Disarmament (1979–83).[42]

In the 1978 Final Act the CD was given a broad and ambitious mandate by the General Assembly to

> undertake the elaboration of a comprehensive programme of disarmament encompassing all measures thought to be advisable in order to ensure that the goal of general and complete disarmament under effective international control becomes a reality in a world in which international peace and security prevail and in which the new international economic order is strengthened and consolidated.[43]

It was designed to be the primary multilateral negotiating forum for the international community on issues of disarmament and arms control. The annual meetings of the CD last approximately six months, during which it is to deal with the 'decalogue' of issues agreed on in its initial agenda mandate in 1978. These are (i) nuclear weapons in all aspects; (ii) chemical weapons; (iii) other weapons of mass destruction; (iv) conventional weapons; (v) reduction of military budgets; (vi) reduction of armed forces; (vii) disarmament and development; (viii) disarmament and international security; (ix) collateral measures, confidence-building measures, and effective verification methods in relation to appropriate disarmament measures, acceptable to all states concerned; and (x) a comprehensive programme of disarmament leading to general and complete disarmament under effective international control.[44]

In 1978 the CD was composed of 40 member states, including all five acknowledged nuclear weapon states and 35 other states representing geographical regions.

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39. Ibid.
40. Ibid.
41. http://disarmament.un.org/gaspecialsession/10thsesprog.htm.
42. Goldblat, *supra* note 1, at 14–17; Simma et al., *supra* note 8, at 279–80.
43. Para. 109.
44. Goldblat, *supra* note 1, at 14–17; Simma et al., *supra* note 8, at 279–80.

In 1996 the CD decided to admit 23 more states to membership, and in 1999 five more states were added (from 20 states requesting membership).[45]

The CD has a special relationship with the United Nations, in that it is not formally a UN organ, but does have a close working relationship with the organization. The CD adopts its own rules of procedure and its own agenda, usually influenced by recommendations from the UN General Assembly. The CD reports to the General Assembly at least annually. The budget of the CD is included in the budget of the United Nations. Meetings of the CD are held in United Nations facilities and are serviced by UN staff. The Secretary-General of the CD is appointed by the UN Secretary-General and acts as her or his personal representative to the Conference.[46]

Over its four decades of operation, the CD and its predecessor organizations have served as the negotiating and drafting fora for a number of multilateral arms control treaties. The most important of these are the 1968 Nuclear Non-Proliferation Treaty, the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention, and the 1996 Comprehensive Test Ban Treaty. However, in recent years the CD has been significantly hampered in its work by difficult relations between its members, an outdated membership structure, and issue-linkaging between arms control issues that has stymied progress on all fronts.[47]

Despite its broad and inclusive 'decalogue' agenda, the CD in practice only debates one issue in depth at each annual meeting, and must agree on a work programme on that issue for negotiations to proceed. In recent years a number of annual sessions have ended without agreement on a programme of work, or have failed to reauthorize programmes of work agreed in previous years, with the result that since the conclusion of the Comprehensive Test Ban Treaty in 1996, negotiations at the CD have remained deadlocked. It has been argued by Jozef Goldblat, a pre-eminent commentator on arms-control issues, that the CD must be significantly restructured in its membership and given more flexible operating procedures (the most pressing required change being a reworking of the CD's consensus approval rule) or risk complete abandonment as a negotiating forum.[48]

3.5. Analysis of the General Assembly's record in the exercise of its Article 11(1) powers

The General Assembly, both in its plenary sessions and through its subsidiary bodies, has been the central forum within the United Nations for consideration of arms control and disarmament issues, including issues of WMD proliferation.

It has been instrumental, particularly through its support of the Conference on Disarmament and its predecessors, in facilitating the negotiation and establishment of a number of the cornerstone multilateral treaties in this area, including the NPT, the Biological Weapons Convention (BWC), and the Chemical Weapons Convention

45. Ibid.
46. Ibid.
47. Ibid.
48. J. Goldblat, 'The Conference on Disarmament at the Crossroads: To Revitalize or Dissolve?', (2000) 7 *The Nonproliferation Review* 104.

(CWC).[49] However, when viewed in the light of the fact that it has been working on these issues since the passage of its very first resolution in 1946, it is nevertheless fair to say that the results actually produced through the General Assembly's sixty years of efforts to fulfil its Article 11(1) mandate have been relatively modest.[50]

The challenges it has faced in its efforts to fulfil this mandate have of course included the difficulty in achieving consensus, or even majority agreement, among so large a group of states, on issues of such sensitivity and varied political meaning as those involved in military armaments regulation. This failure to achieve broad agreement was most pronounced during the decades of the Cold War, when alliances were drawn between the two superpowers, but even the 'new world order' of international co-operation achieved in some other areas since the early 1990s has not enabled the states of the General Assembly to find much common ground on issues of weapons regulation, and particularly on issues of nuclear technologies. Deep schisms have emerged between the developed and developing world over access to nuclear technologies and over nuclear disarmament.[51] These fundamental disagreements over nuclear technologies have foiled countless attempts to find 'general principles of cooperation' acceptable to a broad spectrum of General Assembly members.

However, the General Assembly has in many ways also compromised its own ability to influence international debate on these issues by its unconsidered and even irresponsible use of its Article 11(1) powers of recommendation. As mentioned previously, the passage of resolutions by bare majority on issues of high political sensitivity, simply to add leverage to one position or another on already controversial matters, has not contributed to the building of such broad-based consensus. The General Assembly has, in many instances of the passage of resolutions on issues of arms regulation, not exercised sound judgement and prudence, which at times have argued for reserve and for the abandonment of proposals which were of a divisive and unproductive nature. This lack of judgement has resulted in a situation in which one does not find a clear, consistent pattern of principled recommendations to the member states or to the Security Council. Rather, the principles contained in General Assembly resolutions, particularly on issues of nuclear weapons and related technologies, are highly varied, sometimes inconsistent, and not representative of broad agreement among General Assembly members.[52] This murky record of principles emanating from the General Assembly has contributed to the overall failure of the United Nations to play a meaningful role in efforts to build a comprehensive multilateral normative system on arms control and non-proliferation, leaving the non-proliferation law system which has evolved since the signing of the United Nations Charter to grow up through essentially *sui generis* movements outside the formal United Nations framework.

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49. F. Kalshoven, 'Arms, Armaments and International Law', (1985-II) *Rec. des Cours* 191, at 310; O. Kimminich, 'Disarmament', in R. Wolfrum (ed.), *United Nations: Law, Policies and Practice* (1995), 407.
50. Simma et al., *supra* note 8, at 280.
51. D. Joyner, 'The Nuclear Suppliers Group: History and Functioning', (2005) 11(2) *International Trade Law & Regulation* 33, at 38–9.
52. Goldblat, *supra* note 1, at 34–5.

4. The Security Council

4.1. Analysis of the Security Council's role in fulfilment of its Article 26 obligations

However, if the General Assembly has failed to fulfil its role under Article 11(1) of the Charter, despite its significant efforts and the expenditure of time and resources on issues of arms control and non-proliferation, the Security Council's record of efforts to fulfil its role under Article 26 of the Charter has been virtually non-existent, at least since 1949.

The Security Council has had a supervisory role over a number of subsidiary bodies working in the area of arms control, most importantly including the Commission on Conventional Armaments (CCA) and the previously discussed Atomic Energy Commission.[53] However, since both subsidiary bodies were themselves composed primarily of the members of the Security Council, the political differences between the permanent members of the Council which were most acute during the Cold War trickled down into the operation of these bodies as well, such that there was frequent deadlock within the groups, resulting in failure even to agree on reports to be submitted to the Security Council.[54]

Despite frequent discussion within the Security Council of issues of arms control and proliferation, and their importance and relevance to international peace and security, the lack of agreed reports by these working groups, as well as the divisions in the Council itself, has resulted in almost six decades in which there has not been one clear instance of the Security Council exercising its Article 26 authority to formulate concrete 'plans for the establishment of a system for the regulation of armaments', to be passed along to member states. Article 26 has thus remained essentially a dead letter within the Charter, even since the ending of the Cold War and the beginning of the renewed era of international co-operation ushered in thereby, which has witnessed a reinvigoration of the Security Council and its activities in other areas of international security concern over the past fifteen years.[55] In short, the Security Council has utterly failed to fulfil its obligations under Article 26. Article 26 is rarely even mentioned in Security Council resolutions, and the emphasis of the international community on the creation of non-proliferation law, at least until 28 April 2004, had very much switched to a focus on such non-UN fora as the Conference on Disarmament and other regional security groups such as the Organization for Security and Co-operation in Europe (OSCE) and the Preparatory Commission for the Denuclearization of Latin America (COPREDAL).

4.2. Analysis of the Security Council's Chapter VII role and powers

However, while not included in those Charter articles in which specific mention is made of arms control and weapons proliferation, the Security Council's powers under Chapter VII of the Charter certainly give it another role to play in

53. Simma et al., *supra* note 8, at 473–5.
54. Ibid.
55. Ibid.

non-proliferation law under the Charter system. This is an enforcement role, in which the Council may determine under Article 39 of the Charter 'the existence of any threat to the peace, breach of the peace, or act of aggression' and, having made that determination, can move on to take action under Articles 40, 41, and 42 to restore international peace and security.[56]

Under Article 40, before taking enforcement measures the Council can first call on the parties to a dispute to take 'provisional measures' calculated to resolve the dispute. An example of such provisional measures in the non-proliferation law area can be found in Security Council Resolution 1696, passed on 31 July 2006, which demanded that Iran cease uranium enrichment activities on its soil, giving it a deadline of 31 August 2006 to comply with the demand.

If such provisional measures are ineffective in bringing a peaceful resolution to the conflict, the Council may take enforcement action under Articles 41 and 42. Under Article 41 the Council can authorize 'measures not involving the use of armed force ... to be employed to give effect to its decisions'. These measures typically include the requirement of diplomatic and economic sanctions by UN members as against the deemed authors of the threat, and are illustrated in the passage, on 14 October 2006, of Resolution 1718, which imposed targeted economic sanctions on North Korea in response to its testing of a nuclear device five days earlier.

If, however, the Council determines that these measures short of military force either are likely to be, or have proved to be, ineffective, it may under Article 42 authorize the use of military force by UN members, as an exception to the general non-intervention obligation established in Article 2(4) of the Charter.[57] The most notable case of the enforcement role of the Security Council in the non-proliferation law area is Resolution 687, passed on 3 April 1991. In Resolution 687 the Council addressed the threat posed by Iraq specifically with regard to its possession and threatened use of chemical and biological weapons, in violation particularly of the Geneva Protocol of 1925 and the Biological Weapons Convention of 1972. It also acted on intelligence from member states regarding the presence in Iraq of nuclear-weapons-related technologies, and activities geared toward the development of nuclear weapons, in violation of Iraq's obligations under the 1968 Nuclear Non-Proliferation Treaty. These violations and the threats posed by them had, of course, become all the more poignant and pressing through Iraq's unlawful invasion of Kuwait in 1990.[58]

In Resolution 687 the Security Council imposed specific weapons-related prohibitions on Iraq, in order effectively to disarm it of its WMD and related technologies possessions, including ballistic missiles of a range greater than 150 kilometres. Along with these prohibitions on possession, Resolution 687 reauthorized a mandate, first authorized in Resolution 661, for a broad range of international sanctions, including

56. E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 133–45, 178–87.
57. C. Gray, *International Law and the Use of Force* (2000), 187–95.
58. D. Joyner, 'The Challenges of Counterproliferation: Law and Policy of the Iraq War', in A. Williams and P. Shiner (eds.), *The Iraq War and International Law* (forthcoming 2007).

prohibitions on the importation of goods of Iraqi origin and on the export to Iraq of a broad range of goods and services related to the production of WMD, as well as a range of other financial and economic sanctions.[59]

The resolution further imposed on Iraq the obligation to co-operate with an ad hoc UN weapons inspection regime, the United Nations Special Commission on Iraq (UNSCOM), later renamed the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC). UNSCOM was tasked, along with the International Atomic Energy Agency (IAEA), with verifying Iraq's compliance with the disarmament provisions of the resolution.[60]

5. The Security Council as legislator

5.1. Security Council resolutions from 1945 to 2001

For purposes of the present analysis, it is important to note that Resolution 687 shared a number of important characteristics with almost every other Security Council resolution passed since 1945. Notwithstanding its broad endowments of power under the Charter, for the first 45 years of the existence of the United Nations, and due primarily to political tensions between the United States and the Soviet Union, the Security Council was able to exercise its binding Chapter VII authority only rarely.[61] The most famous such use occurred in June 1950, when, during a period of Soviet boycott of Security Council sessions, the Council passed Resolutions 82 and 83 authorizing UN member states to act forcefully to remove North Korean (DPRK) military forces back to the 38th parallel following the DPRK's attack of 25 June on the Republic of Korea and crossing of the agreed administrative boundary.[62]

However, with the fall of the Soviet Union, the Security Council in the 1990s entered a phase of dramatically increased activity and of both willingness and ability to exercise its Chapter VII authority. This trend began in earnest with Resolution 678 in 1990, which authorized UN member states to use military force to expel Iraqi forces from Kuwait. Thereafter the Security Council used its Chapter VII authority to pass resolutions with regard to situations in, among other places, the Balkans, Haiti, Somalia, Rwanda, the Democratic Republic of the Congo, Afghanistan, Libya, and Iraq.[63] The decisions and measures enacted through these resolutions were of a varied character. In addition to the authorization of force contained in Resolution 678, these measures included arms embargoes, as in the cases of Yugoslavia and Somalia; various economic sanctions regimes including those with regard to Afghanistan and Libya; a disarmament regime in Iraq; an interim force in Haiti to maintain order after the resignation of President Jean-Bertrand Aristide; and, notably, the creation of two ad hoc international criminal tribunals in the cases of the former Yugoslavia

59. UN Doc. S/Res/661 (1990).
60. On UNSCOM and its efforts in Iraq see J. Cirincione et al., *Deadly Arsenals: Nuclear, Biological and Chemical Threats* (2005), 329.
61. Gray, *supra* note 57, at 145–9.
62. UN Doc. S/Res/82 (1950); UN Doc. S/Res/83 (1950).
63. Gray, *supra* note 57, at 163–99.

and Rwanda.[64] However, as indicated previously, all these resolutions shared some common characteristics.[65]

First, in each case the Council acted in response to a situation that had arisen in international relations – that is, it adopted a responsive as opposed to a proactive posture.[66]

Second, the decisions of the Council in almost every case can be characterized as actions enforcing existing international law, whether specifically UN Charter law as in the case of the 1990 Iraqi invasion of Kuwait, or law contained in other international instruments, such as the 1948 Genocide Convention in the case of Rwanda.[67]

Third, in each case the resolutions passed were targeted at specific named countries, usually not more than one in a single resolution. On the basis of Article 25 of the Charter these resolutions imposed obligations on states, both on the target state(s) and, in many cases, on the general membership of the United Nations. However, those universal obligations, when they were present, had solely to do with maintaining or restoring international peace and security in discrete cases where that peace and security had been threatened by the actions of one or, in a few cases, a handful of states. Thus the purpose of the resolutions was never to impose, in an abstract manner, obligations on the general UN membership without reference to such a discrete situation of threat to international peace and security.[68]

Fourth, the binding applicability of each resolution was either explicitly or implicitly of a temporary duration, and resolutions almost without exception made this fact clear. In many cases there was spelled out in the resolution a particular event or situation, the transpiring of which, as verified by the Council, was to terminate the obligations on both the target state(s) and general UN membership. In all cases it was understood that once the situation which triggered the Council's determination of a threat to the peace under Article 39 had ceased to exist, through whatever means, the force of the resolution and the obligations it imposed were to end.[69]

Finally, in each case the Council acted in an ad hoc manner, meaning that it acted on each case as it arose and it did not try to project or predict the character or particularities of similar situations which would arise in the future, nor did it attempt to address such potentially arising future cases through a present normative statement.

In short, for the first 56 years of its existence, the Security Council clearly understood its role to be that of an executive body, entrusted by all UN members with the responsibility and authority to enforce the generalized obligations of the UN Charter as well as other rules of international law, the breach of which gave rise

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64. Malone, *supra* note 2; M. Hilaire, *United Nations Law and the Security Council* (2005).
65. See generally de Wet, *supra* note 56, at 133–215; D. Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter* (2001), 163–202.
66. Happold, *supra* note 5, at 598–600.
67. D. W. Bowett, 'Judicial and Political Functions of the Security Council and the International Court of Justice', in H. Fox (ed.), *The Changing Constitution of the United Nations* (1997).
68. Happold, *supra* note 5, at 598–600.
69. De Wet, *supra* note 56, at 308–10; M. Koskenniemi, 'The Police in the Temple: Order, Justice and the UN – A Dialectical View', (1995) 6 EJIL 325, at 339.

to situations which threatened international peace and security. It was to use its powers under Chapter VII to authorize effective collective measures to restore and maintain international security on a case-by-case basis, responding to the dynamics of international relations as they occurred through the passage of resolutions which authorized forceful or non-forceful measures to this end to be applied for a temporary duration as against the specific authors of the threat.[70] As D. W. Bowett has noted,

> The obligations of member states stem from the UN Charter, and the role of the Security Council is not to create or impose new obligations having no basis in the Charter, but rather to identify the conduct required of a Member State because of its pre-existing Charter obligations. Thus, the Council does not 'legislate': it enforces Charter obligations.[71]

This understanding of the powers of the Security Council and its role as an executive organ within the United Nations framework continued until the passage of Resolution 1373 in 2001 and, most relevant to the current analysis, Resolution 1540 in 2004.

5.2. Resolutions 1373 and 1540

Security Council Resolution 1373 was passed on 28 September 2001, only 17 days after the terrorist attacks on New York and Washington, DC. The resolution begins by recalling the 11 September attacks and by 'Reconfirming that such acts, like any act of international terrorism, constitute a threat to international peace and security'. It thus clearly grounds the jurisdiction of the Security Council over international terrorism pursuant to its powers of determination under Article 39 of the Charter.

In its operative paragraphs, Resolution 1373 'Decides that all states shall' prevent and suppress the financing of terrorist acts, including by criminalizing terrorist fundraising and donation activities, and by freezing assets of known terrorist individuals or entities. It goes on to decide that all states shall refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts; take necessary steps to prevent the commission of terrorist acts, deny safe haven to those who finance, plan, or support terrorist acts, and ensure that any person who participates in terrorist act is brought to justice.

It further calls on all states to co-operate in the fulfilment of these obligations through co-ordination of law enforcement activity and through increased information sharing between law enforcement agencies at the national level. It establishes in Paragraph 6 a Committee of the Security Council (the Anti-Terrorism Committee) to monitor the implementation of the resolution. All UN member states are to report to the Committee within 90 days of adoption, and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement the resolution.

It is worth noting that in many respects Resolution 1373 mirrors the provisions of the 1999 Convention for the Suppression of the Financing of Terrorism.

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70. Happold, *supra* note 5, at 593.
71. Bowett, *supra* note 67.

However, unlike the Convention it importantly does not include definitions of several key terms used in the text of the resolution, including 'terrorism', 'international terrorism', 'terrorist acts', and 'terrorists'.[72]

On 28 April 2004 the Security Council passed Resolution 1540. This resolution was passed not coincidentally shortly after the revelation in February 2004 of the existence of a long-standing clandestine nuclear materials smuggling ring headed by the father of Pakistan's gas centrifuge programme, Dr Abdul Qadeer Khan.[73]

In Resolution 1540 the Security Council undertook to address a number of fundamental limitations of the existing non-proliferation treaties and regimes system. The first is the problem of the non-universality of the system, a result of the fact that traditionally all such treaties and regimes were adopted only voluntarily by states, and that for a variety of reasons many states, including some of significant proliferation concern, have elected to remain outside the regimes system.

A second major challenge to the non-proliferation treaties and regimes system is the fact that all existing restrictions within the regimes on the manufacture, possession, and trafficking in weapons-related technologies are addressed to states themselves. Thus at the international level there is no substantive restriction on private parties, including business entities as well as other non-state actors, engaging in any of these activities.

The resolution addresses the non-state actor problem, described above, in Operative Paragraph 1, in which it provides that 'all States shall refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery'. Furthermore, Operative Paragraph 2 provides that 'all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them'.

It then addresses in Operative Paragraph 3 the problem of universality of non-proliferation law by directly imposing an obligation on states to establish and maintain effective export control laws and regulations at the national level, 'including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing ... as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations'.

As in Resolution 1373, Resolution 1540 in Operative Paragraph 4 establishes a Committee of the Security Council to monitor the implementation by states of the obligations imposed by the resolution.

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72. Happold, *supra* note 5, at 593.
73. D. Joyner, 'International Legal Responses to WMD Proliferation', in C. Hughes and R. Devetak (eds.), *Globalization and Violence* (2007).

Although these two resolutions were adopted in very different contexts and are meant to cover quite different, although of course related, areas of law, they share important similarities in structure as well as in legal import. These two resolutions have been claimed by some commentators as ushering in a new age of Security Council jurisprudence and signalling an intent by the Council to act as a legislative body, in supplementation of its executive functions.[74]

There had before the passage of Resolution 1373 been other controversial acts of the Security Council which had caused debate on the topic of the proper role and powers of the Council.[75] Notable in this regard were the actions before the International Court of Justice (ICJ) stemming from the explosion of Pan Am flight 103 over Lockerbie, Scotland, in 1988. During the resulting diplomatic tensions between the United States and the United Kingdom on the one part and Libya on the other, the Security Council in 1992 passed Resolution 748 in which it demanded that Libya hand over two men suspected of involvement in the Lockerbie bombing, and determined 'that the failure by the Libyan government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in Resolution 731 constitute a threat to international peace and security'.[76]

The suggestion was raised at the time by a number of commentators, and later formally put to the Court by Libya itself, that this determination was arguably prejudicial to Libya's rights under Article 14 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. There was also discomfort, expressed by several of the judges, regarding the Council's characterization of this situation as a threat to international peace and security, by which the Council invoked its powers under Chapter VII through the gateway criteria of Article 39.

As Judge Shahubuddeen stated in his opinion,

> The question now raised . . . is whether a decision of the Security Council may override the legal rights of states, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the United Nations within the evolving international order, is there a conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits, and what body, if other than the Security Council, is competent to say what those limits are?[77]

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74. Happold, *supra* note 5, at 593.
75. M. Koskenniemi, *supra* note 69, at 325; K. Harper, 'Does the United Nations Security Council Have the Competence to Act as a Court and Legislature?', (1994) 27 *NYU Journal of International Law and Politics* 103; B. Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?', (1999) 10 EJIL 517.
76. UN Doc. S/Res/748 (1992).
77. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Request for the Indication of Provisional Measures, Order of 14th April, 1992, [1992] ICJ Rep. 3, at 142.

However, although in the *Lockerbie* cases there was an allegation that the Council had overstepped its prerogatives under the Charter, there was no hint of legislative aspirations in the Council's actions. The resolutions involved were clearly targeted against the acts and omissions of one state, Libya, and they set clear demands, which, if met, would bring about the end of the mandate for exercise of Council authority. Thus they were in keeping with the Council's understood role, if perhaps excessively bold in construction.

Other examples of Security Council decisions more specifically alleged to constitute legislation include the previously discussed imposition of disarmament obligations on Iraq through Resolution 687, as well as the establishment by the Council of the ad hoc international criminal tribunals.

With regard to Resolution 687, while the obligations imposed on Iraq did go beyond those to which it was bound under the 1925 Geneva Protocol and the 1972 BWC, and thus could be seen as new law created by the Council and operating on Iraq, there were in this case decidedly un-legislative characteristics as well. The obligations imposed by Resolution 687 were clearly conceived to be temporary, ending as they would once Iraq's compliance with the terms of the resolution had been verified by UNSCOM and the IAEA. The resolution targeted only one country, and the sanctions regime which imposed obligations on all UN members was only incidental to this primary normative object. And finally, this resolution was adopted in a reactive posture, the Council having been shown definitively through intelligence gained after the conclusion of the Gulf War that the Saddam Hussein regime had engaged in a clandestine and illegal weapons-development and stockpiling programme.

With regard to the establishment by the Council of the two ad hoc criminal tribunals, the creation of these courts should properly be seen as special responses to specific situations of fundamental breach of international law. Each court was given a jurisdictional mandate tightly limited in both geography and chronology, as well as in subject matter. Further, the subject matter over which jurisdiction was to spread was essentially composed of breaches of already existing law, simply codified in the respective court statutes.

Because of the significant non-legislative characteristics attending the passage of these and virtually all other Security Council decisions, it can be concluded that at the end of the 1990s the Security Council had not yet passed a true piece of international legislation.[78] However, in the swelling of outrage and concern following the attacks of 11 September 2001, and, as has been alleged, with little foresight of the legal import of what they were doing, the Council passed Resolution 1373.[79] The Council passed this resolution not to respond specifically to the 11 September acts of terror themselves, nor to mete out any measure of punishment on its perpetrators, nor specifically to target them or those states that aided and abetted them. The Council rather used the attacks as a backdrop and a catalyst for the establishment of a

78. Happold, *supra* note 5, at 593.
79. Ibid.

much broader and temporally indefinite normative regime addressing the subject of international terrorism.

The context of the passage of Resolution 1540 offers even less evidence of a specific situation of threat to international peace and security against which it is to be understood that the resolution operates and to which it is to be understood to respond. Again, the revelation of the Khan network provided a circumstantial pretext which seemed to explain the prioritization of the subject of WMD proliferation and its address by the Council in Resolution 1540, but the resolution itself went far beyond simply responding to the existence of this network. It newly imposed a broad set of obligations on all UN member states, with the purpose of changing permanently the structure and content of national legal systems.

These resolutions, simply put, cannot be described as ad hoc responses to events urgently arising in international politics. They are, rather, calculated, proactive, forward-looking normative creations. In both cases the Security Council simply determines that an entire class of actions which have been and which may in the future be committed potentially by any state constitute such a threat. The Council then decides in each case that all UN member states shall take extensive measures broadly prescribed in the resolutions, including changes to their national legal systems, in order to combat these ill-defined present and future threats. The obligations imposed under both Resolutions 1373 and 1540 are not temporally limited, either explicitly or implicitly. Their duration is clearly meant to be indefinite. Moreover, there are no specifically targeted states. The obligations imposed in the resolutions are stated in an abstract manner, so as to make their application clearly universal.

5.3. The limits of Chapter VII

The UN Charter in Article 24 confers on the Security Council 'primary responsibility for the maintenance of international peace and security'. In the same paragraph the members of the United Nations 'agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf'. This statement is the closest the Charter comes to attempting to remedy the non-democratic reality, made requisite by geopolitical circumstances in 1945, that the most powerful organ of the United Nations and the only organ capable of issuing decisions binding on all UN members is composed of only 15 of those members (who now total 191), five of whom are given permanent status and have an effective veto power over every decision of the Council.

In this language, which seems to imply a representative relationship between the Council and the rest of the UN membership, the Charter attempts to legitimize the declaration in Article 25 by the membership that all UN members 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. Thus Article 25 establishes the binding character of Security Council decisions on the entirety of the UN membership.

Although the powers granted to the Security Council under the Charter, and particularly in the articles of Chapter VII, are both broadly and vaguely worded, the Charter does, however, provide limits to the discretion of the Council in its exercise of these powers. As the Council derives its powers from the Charter's terms, it is by

the same process bound by the constraints and limitations of those terms. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has observed,

> The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).[80]

One such limiting provision on the Council's power is Article 24(2), which provides that 'In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations.' The purposes and principles of the United Nations to which this article refers are to be found in Articles 1 and 2 of the Charter, and include the right of states to self-determination, respect for human rights, the principle of sovereign equality, an obligation to act in good faith, and an obligation not to intervene in matters 'essentially within the domestic jurisdiction' of member states. As the International Court of Justice stated in the *Certain Expenses* advisory opinion in 1962,

> When the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organization.[81]

Another limiting provision is Article 25. As previously stated, the greatest import of the text of this article is the establishment of the universally binding character of Security Council decisions. However, the fact that, under this provision, members agree to accept and carry out the decisions of the Security Council 'in accordance with the present charter' suggests that the measure of this obedience should be contingent on the validity of the Council's decisions and actions as held up to the standard of the provisions of the Charter, and further that it is conceivable that other provisions of the Charter might in some cases take precedence over conflicting Security Council decisions. To paraphrase the article's meaning in this regard, UN members are not obligated to comply with the decisions of the Council one wit further than those decisions themselves comply with the provisions of the Charter.

Some have suggested that the language 'in accordance with the present charter' refers to the decisions of the Council rather than to the obligations of UN members, serving merely to emphasize the obedience due to the Council according to the provisions of the Charter. This interpretation, however, would render this last clause of the article almost completely redundant and therefore superfluous, thereby defying principles of clear and efficient textual construction. This interpretation is therefore less persuasive.

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80. *Prosecutor v. Dusko Tadić*, Appeals Chamber Decision on the Tadić Jurisdictional Motion, Case No. IT-94-1-AR72, 2 October 1995, para 28.
81. *Certain Expenses of the United Nations*, [1962] ICJ Rep. 151, at 168.

Although the general purposes and principles of the United Nations, while plainly stated in Articles 1 and 2, are difficult to apply in a meaningful way so as to provide justiciable limitations on the powers of the Security Council under Article 24(2), in the non-proliferation issue area the process for creation of new non-proliferation law contained in Articles 11(1) and 26 described above does provide a clear, authoritative lawmaking procedure which can properly be called the UN Charter system for creation of non-proliferation law. As such, it is a part of the substantive law of the Charter in accordance with which, under Article 25, the Security Council is bound to act.

Thus, while the provisions of the Charter in many instances provide limitations to the powers of the Council which, though valid, are difficult to apply unambiguously due to the presence of the lawmaking system contained in Articles 11(1) and 26, the non-proliferation law creation issue area fortunately does not labour under the same difficulty. It is argued herein that the Article 25 limitations on the Council's powers can be applied in the non-proliferation law issue area because of the presence of the criteria for legitimate lawmaking by UN bodies contained in Articles 11(1) and 26. Accordingly, any act by the Security Council which attempts to create 'a system for the regulation of armaments' outside the Article 11(1) and Article 26 institutional process is in breach of Article 25, and is thus an act *ultra vires* the Council's authority.[82]

It is argued that Security Council Resolution 1540 meets this test precisely. This resolution clearly attempts to establish, or at the least contribute to the establishment of, a system for the regulation of WMD which includes a universalized export control law requirement and a universalized requirement to enact laws on the subject of non-state actors. Therefore, to be valid as a source of binding obligation on UN member states, it is argued that this system of obligations cannot be established through the Council's use of its Chapter VII powers, but must rather be constructed through the procedures provided for in Articles 11(1) and 26.

5.4. Analysis and argument

The essential argument herein is that in passing what can only be viewed as an ostensible piece of international legislation in Resolution 1540, the Security Council has confused the proper scope of its enforcement powers under Chapter VII with the proper scope of its long unused, limited lawmaking powers under Article 26, and has taken to itself by unilateral exercise of its Chapter VII powers a role which, under the Charter system, it is to share both with the General Assembly in the exercise of its Article 11(1) powers and with the general membership of the United Nations, to whom it is directed under Article 26 to submit proposals for the creation of new international laws in the area of weapons proliferation.

This conclusion proceeds from the analysis that the post-11 September war on terrorism has, for the first time in the history of the United Nations, led to an international security situation in which unified support can be achieved among the

82. Happold, *supra* note 5, at 593.

permanent members of the Security Council for such broadly conceived resolutions as Resolution 1540, which addresses a problem seen to be of global scope and threat to international peace and security. However, it is argued that, with this new-found unity of purpose, the proper Charter system for such lawmaking actions, with the express limitations on the role and powers of UN organs in this area laid out in the Charter, has been forgotten, or more likely ignored for the sake of political expediency.

After all, why go through a lengthy process entailing consideration in the General Assembly, recommendation to the Security Council, further consideration in the Council, then recommendation to member states for enactment through a treaty that will in the end probably only be adopted by states not of serious proliferation concern, when alternatively the Council may consider the issue in the first instance and instantiate the obligations through its own authority, in the process making the obligations universal?

The added political, legal, and chronological efficiency of the path chosen by the Security Council is not denied. To the members of the Security Council, and particularly to the permanent members who enjoy the most power from their positions on the Council, when considering the establishment of the obligations contained in Resolution 1540, the long unused Charter system for creation of non-proliferation law would certainly have looked less attractive, particularly as the amount of control they would have been able to exercise over the outcome of the approval process under the Charter system would have been severely diluted from that they would wield through the Chapter VII process.

However, none of these reasons of expedition and control give sufficient justification for going around the Charter system and assuming a lawmaking authority which was never intended to be exercised by the Council under the Charter. The Charter system in Articles 11(1) and 26 is the authoritative system for the creation of new non-proliferation law for good reasons. The system in Articles 11(1) and 26 divides roles among the political organs of the UN, leaving the final and most important role – of actual establishment as law of the principles generated through this institutional process – to the member states of the United Nations themselves. This system was created by the Charter framers in maintenance of the classical principles of state sovereignty and sovereign equality in international lawmaking, and was consistent with the resulting idea that the consent of states to be bound underlies the validity of all of the sources of international law, in the positivist tradition. This system was informed by the understanding that the consent given to Council authority in the first instance by states in Article 25 of the Charter does not equate to direct consent of states at the second instance to every substantive decision of the Council. And while this distinction is less troublesome in the domestic context under most theories of the positivist social compact, it is troubling to states in the international legal system which more jealously guard their sovereign autonomy under the sometimes maligned, but still quite virile, Westphalian sovereignty paradigm.

Recent attempts by scholars to justify the role of the Security Council as lawmaker based on its powers under the UN Charter take advantage of the breadth and

vagueness of the textual recitations of those powers in making their arguments, but lose sight entirely of the spirit of the provisions and the proper place of the Council under a correct understanding of fundamental principles of international lawmaking.[83] This misunderstanding was not shared by members of the Council itself for the first 56 years of its operation, and these broadly phrased powers were exercised with due caution and reservation until the passage of Resolution 1373.

5.5. Practical effects

What, then, are the practical effects of this conclusion that Resolution 1540 was passed *ultra vires* the Security Council's authority? The Council not having possessed the authority to issue such a resolution, the decision thus rests on no legal foundation, and thus has no binding effect on members of the United Nations. In short, the procedural invalidity of Resolution 1540 results in its being null and void of legal effect.

There is a fine legal point to be made on the subject of laws deemed to be invalid procedurally, as to whether such a law is void *ab initio* (from its inception), or alternatively whether such a law is simply voidable, meaning that the valid legal effect of the law remains in place until the invalidity of the law is authoritatively declared by a competent body. The distinction between these two effects is to be found in whether there is an effective procedural remedy available through which such a determination can be made.[84] As Karl Zemanek has explained,

> According to the general theory of law, the absence of a procedural remedy against an alleged illegal act, i.e. a procedure in which the act could be declared void (relative nullity), makes the act ipso facto null and void (absolute nullity).[85]

Eli Lauterpacht has noted further, '[T]he whole question of the effect of illegal acts is closely linked with that of the existence of suitable machinery for determining whether the act is in fact illegal.'[86]

In the case of Security Council resolutions there is only one body which could act as an independent procedural check, and which could potentially authoritatively declare a Council resolution void of legal effect. This of course is the principal judicial organ of the United Nations, the International Court of Justice.

The question of the capacity of the International Court of Justice to review Security Council decisions for validity is one a full consideration of which is not possible within the scope of the present article. However, this question has been considered at length by other academic commentators, as well as by the Court itself on a number of occasions.[87] As Judge Skubiszewski noted in the *East Timor* case,

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83. S. Talmon, 'The Security Council as World Legislature', (2005) 99 AJIL 175; F. Kirgis, 'The Security Council's First Fifty Years', (1995) 89 AJIL 506, at 520–8; Harper, *supra* note 75, at 149.
84. Schweigman, *supra* note 65, at 282–5.
85. K. Zemanek, 'Is the Security Council the Sole Judge of Its Own Legality?', in E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Mohammed Bedjaoui* (1992), at 642.
86. E. Lauterpacht, 'The Legal Effect of Illegal Actions of International Organisations', in D. Bowett et al., *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965), 115.
87. Martenczuk, *supra* note 75, at 517; J. Alvarez, 'Judging the Security Council', (1996) 90 AJIL 1.

> The Court is competent, and this is shown by several judgments and advisory opinions, to interpret and apply the resolutions of the Organization. The Court is competent to make findings on their lawfulness, in particular whether they were *intra vires*. This competence follows from its function as the principal judicial organ of the United Nations. The decisions of the Organization (in the broad sense which this notion has under the Charter provisions on voting) are subject to scrutiny by the Court with regard to their legality, validity and effect.[88]

Similarly, Judge Lauterpacht stated in his opinion in an ICJ Order of 13 September 1993, with regard to UN Security Council resolution 713:

> The Court, as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation.[89]

Some have noted that this competence to review might be circumscribed by the principle of litispendence, which is a principle of both domestic and international law and which can be a preliminary objection to the admissibility of a claim before a court. Litispendence is essentially concerned with the existence of situations in which concurrent jurisdiction is had over the same matter by two separate organs possessing similar jurisdiction. The concern in the present context would be that, due to the Security Council's authority to maintain international peace and security under Chapter VII, and the ICJ's authority to decide legal disputes properly brought before it under Article 36(2) of the ICJ Statute, the Security Council and the ICJ could potentially be concurrently seized of a matter, which would potentially serve as a basis for contesting the admissibility of a claim brought before the ICJ in such a situation.

However, the ICJ has consistently rejected objections to its jurisdiction based on the principle of litispendence. As David Schweigman has observed,

> [The Court's] position has been that the Council and the Court are independent organs exercising 'separate but complementary' functions . . . According to the International Court of Justice, the independence of the Court and the Council does not mean that both organs should not cooperate in respect of a matter of which they are simultaneously seized. It means that the Court will not decline to exercise jurisdiction for the sole reason that the dispute brought to its attention is pending before the Council. This approach has been adopted by the Court in the *Hostages*, *Nicaragua*, and *Bosnia* cases.[90]

It is clear from the Court's own jurisprudence, as well as from the preponderance of academic literature on the subject, that the ICJ does have the subject-matter jurisdiction to review decisions of the Security Council for validity under Charter law. The practical ability of the Court to exercise this role is significantly limited, however, due to other aspects of its jurisdictional mandate under its statute.

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88. *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep., at 90.
89. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 13 September 1993, [1993] ICJ Rep., at 325.
90. Schweigman, *supra* note 65, at 260–1.

Firstly problematic in this regard is the refusal of many states to submit to the compulsory jurisdiction of the Court under the 'optional clause' of the Statute, Article 36(2), which frequently prevents the Court from exercising personal jurisdiction over necessary parties in contentious cases.

Secondly problematic is the fact that the Security Council cannot itself be a party before the Court, as it lacks legal personality for this purpose.[91] On this point it should be noted, however, that the inability of the Security Council to appear itself as a respondent in an action before the ICJ is not fatal to the concept of ICJ review of Security Council decisions. Such a review could still take place incidentally in a dispute between states, and passed on by the court as an issue the resolution of which is necessary to the overall determination of the case, although this would require significant substantive overlap between the instrument granting jurisdiction to the Court and the Council resolution being considered.[92]

Thirdly problematic is the general lack of justiciable standards to be found in the relatively vague provisions of the Charter, particularly on the subject of the powers of the Security Council, which the Court could use to determine the strict adherence of the Council to its Charter mandate. However, as argued above, this deficit in justiciable standards is not present in the particular case of Resolution 1540.

In summary, the ICJ does have the authority to review Security Council decisions for validity under the law of the Charter, including the limits of the Security Council's power delineated therein; however, because of the Court's other jurisdictional limitations the ICJ does not constitute an effective procedural recourse for seeking authoritative pronouncements on the validity of Security Council decisions.[93]

Without an effective independent body which can authoritatively determine that an act of the Security Council is void, the conclusion must be reached that invalid acts of the Security Council are not simply voidable, but are in fact void *ab initio*, and are devoid of legal effect from the time of their pronouncement.[94] This indeed was the conclusion of Judge Morelli in his Separate Opinion in the *Certain Expenses* case:

> In the case of international organizations, and in particular acts of the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the United Nations had to be considered as an invalid act, such invalidity could constitute only the absolute nullity of the act. In other words, there are only two alternatives for the acts of the Organization: either the act is fully valid, or it is an absolute nullity, because nullity is the only form in which invalidity of an act of the Organization can occur. An act of the Organization considered as invalid would be an act which had no legal effects, precisely because it would be an absolute nullity. The

91. Ibid., 205.
92. Ibid., 284.
93. Ibid., 284.
94. Ibid. While this conclusion must be reached due to the absence of an effective legal remedy whereunder an invalid act of the Security Council could formally be found to be void, it should be noted that the ICJ can exercise nonbinding advisory jurisdiction as a supplement to its contentious, binding jurisdiction. The use by the ICJ of its advisory jurisdiction in the context of invalid Security Council decisions will not be considered here, but will be considered in the author's forthcoming book, Joyner, *supra* note 7.

> lack of effect of such an act could be alleged and a finding in that sense obtained at any time.[95]

Thus, because of the procedural invalidity of the Security Council's passage of Resolution 1540, the resolution itself is void of legal effect *ab initio.*

6. Conclusion

The trend of legislative leaning by the Security Council, illustrated in the passage of both Resolution 1373 and Resolution 1540, is an alarming one. While to some the products of this activity are welcome legal gap-fillers, doing away with long-standing loopholes in the coverage of existing international legal sources in important areas of international security concern, to those who see in international law a system of multilaterally established rules and institutions which comprise an important check against the unbridled power and influence of powerful states, the assumption of legislative power by the UN Security Council is far less welcome. To the latter group, the utilitarian advantages of instant universal lawmaking by the Council do not serve to justify the dangerous excess of power wielded by the Council, out of all step with both the spirit and letter of the Charter, which is required to produce these effects.

The invalidity of the use of the Council's Chapter VII powers is clearly evident in the case of the passage of Resolution 1540, because of the procedure for legitimate creation of non-proliferation law spelt out in other provisions of the Charter. With such justiciable standards for determining valid and invalid procedure, it is relatively easy in this case to determine the invalidity of the Council's decision, and its consequent nullity as a source of obligation. However, in other cases of Security Council legislation, without clear procedures for legitimate lawmaking elsewhere in the text of the Charter, this invalidity will not be as easily demonstrated, notwithstanding the equally dubious nature of the use of the Council's authority under Chapter VII for this purpose in such cases.

Attention must therefore be paid both by international lawyers and by officials of states interested in the proper maintenance of the limits of the Council's powers, to the establishment of effective institutional checks on this power. Some possibilities for the establishment of such checks include amendment of the articles of the UN Charter which spell out the Council's authority under Chapter VII, and in particular Article 39, which as currently constructed gives the Council an unchecked *compétence de la compétence* regarding its own authority under Chapter VII. Another possibility is amendment of the Statute of the International Court of Justice to broaden the jurisdiction of the Court, both to make accession to personal jurisdiction compulsory for all UN members as well as to give the Court a more explicit mandate to review decisions of the Council for soundness with Charter law, both directly as well as incidentally. A thorough consideration of these possibilities must, however, be taken up elsewhere.[96]

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95. *Certain Expenses*, *supra* note 81, at 222.
96. For a fuller consideration of this debate see Joyner, *supra* note 7.